

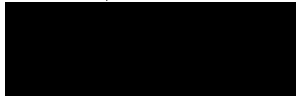


U.S. Citizenship
and Immigration
Services

B4



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

AUG 16 2004

IN RE:

Petitioner:

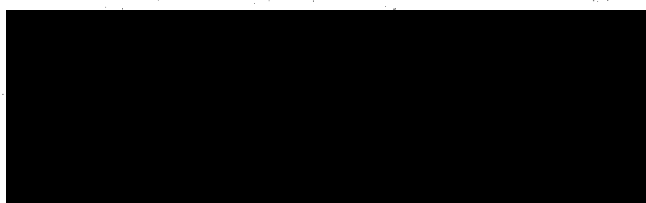
Beneficiary:



PETITION:

Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.¹

The petitioner is an Italian Restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.50 per hour, which amounts to \$23,920 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 2000.

On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of \$1,500,000, and to currently employ 20 workers. In support of the petition, counsel submitted a letter from the beneficiary's previous employer, verifying his employment, a letter from the petitioner in support of the petition, a copy of a largely illegible Federal Tax Deposit Coupon, Form 8109², and a letter from the petitioner's

¹ We note that the AAO is in receipt of a recent letter from new counsel on behalf of the petitioner submitting a Notice of Entry of Appearance as Attorney or Representative (G-28), and additional evidence. We have substituted new counsel in this decision, but given our decision to sustain the appeal, do not consider the additional evidence submitted.

² While the cover letter that the petitioner's counsel submitted with the documents indicates that the petitioner's 2000 tax return was

accountant accompanied by unaudited financial statements which were prepared based upon the representations of management.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 13, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In addition, the petitioner was asked to submit a list of all petitions filed in 2001, along with the proffered salary for each, as it was noted that records indicated that multiple petitions had been filed by the petitioner.

In response, the petitioner submitted Form 1120S corporate tax returns for the petitioner for the 2000 tax year, as well as the tax return for the petitioner's owner.

The tax returns for the petitioner reflect the following information for the following years:³

	2000	2001
Net income	\$379	\$(19,501)
Current Assets	\$20,612	\$15,971
Current Liabilities	\$0	\$0
Net current assets	\$20,612	\$15,971

In addition, counsel submitted copies statements of the petitioner's owner's financial management account, and a copy of an earnings statement for the beneficiary, indicating that he was being paid the offered wage of \$11.50 per hour. With respect to Service Center's request to provide information regarding additional petitions filed, counsel's response indicated that the petitioner had filed two petitions for the position of foreign specialty cook with wages of \$23,920 per petition. Counsel further stated that the petitioner was in sound financial order, had substantial revenues and assets, had not missed a payroll, could forego the compensation of officers if necessary, and could rely upon the claimed substantial assets of the owner in order to pay the proffered wage. (Response to RFE at p.2.)

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 28, 2002, denied the petition.

On appeal, counsel makes various assertions in support of the appeal, referencing various exhibits previously submitted and additional ones submitted on appeal. Counsel's general position is that the petitioner is a successful restaurant, with sufficient assets between its business operations, and the assets of its owner, to pay the proffered wage. Counsel would have the AAO augment the petitioner's income through consideration of items such as officer compensation, depreciation, and liquid assets of the petitioner's owner. Furthermore, counsel

included, it appears that only the Form 8109 was included with the initial submission.

³ While counsel's response to the RFE only contained the 2000 corporate tax return, the 2001 corporate tax return was available at the time of the appeal and we have included the information from that return as well.

notes that the AAO should consider the fact that the evidence indicates that the petitioner has been employed by the petitioner and is now receiving the proffered wage. Counsel cites various non-precedent decisions of the AAO to support the assertions in support of the appeal. However, while 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect. The following is this office's assessment of the principal types of evidence submitted.

Among the evidence in the record are certain financial statements prepared by the petitioner's accountant. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Additionally, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's reliance on the assets of the owner [REDACTED] is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). Citizenship and Immigration Services (CIS) will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v.*

Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, however, were only \$15,971 and would, by themselves, be insufficient to pay the proffered wage.

However, as counsel has pointed out, the beneficiary was employed by the petitioner during the year in question. While the petitioner's wages for that year of \$20,240, as evidenced by the 2001 W-2 Wage and Tax Statement in the record, fall short of the proffered wage, the difference can be made up by applying a portion of the net current assets of \$15,971. In this case, the proffered wage would be met by taking \$3,680 from the net current assets for 2001 and applying them to the petitioner's wages of \$20,240. Consequently, it appears from the evidence in the record that the petitioner has the ability to pay the proffered wage beginning with the priority date.

Upon a review of the record, the AAO concludes that the petitioner has submitted sufficient evidence to demonstrate that it had the ability to pay the proffered wage during the relevant time period. Consequently, we find that the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ORDER: The appeal is sustained, and the previous decision of the director is withdrawn. The petition is approved.